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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PATRICK QUIROZ, DOMINIQUE MIRZA, and LOUISE CRESPO, on behalf of themselves and all others similarly situated

Plaintiffs,

V.

SABATINO TRUFFLES NEW
YORK, LLC and SABATINO
NORTH AMERICA, LLC,

Defendants.

Case No. 8:17-cv-00783-DOC-KES

Assigned to: Hon. David O. Carter

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANTS SABATINO
TRUFFLES NEW YORK, LLC AND
SABATINO NORTH AMERICA,
LLC'S MOTION TO DISMISS THE
AMENDED COMPLAINT**

Filed concurrently herewith:

Please concurrently herewith:

- (1) Notice of Motion and Motion to Dismiss the Amended Complaint
- (2) [Proposed] Order
- (3) Defendants' Request for Judicial Notice in Support of Defendants' Motion to Dismiss the Amended Complaint

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1 INTRODUCTION

2 Defendant Sabatino North America, LLC¹ (“Sabatino” or, with Defendant
3 Sabatino Truffles New York, LLC “Defendants”) has deep roots in Italy and in its
4 passion for truffles. Beginning in 1911, in a small Italian town, the Sabatino family
5 used dogs to help hunt for truffles, and then prepare those truffles following traditional
6 recipes, keeping all their quality, taste and aroma. Over the many years since 1911,
7 the Sabatino family prides itself on carrying a range of high quality truffle products.
8 Despite Sabatino’s unrelenting practice to create the ultimate truffle experience,
9 Plaintiffs Patrick Quiroz, Dominique Mirza, and Louise Crespo (“Plaintiffs”) purport
10 to bring a nationwide class action lawsuit against Defendants alleging various
11 violations of California, New York, Pennsylvania, and federal consumer protection
12 statutes and state common law claims on the theory that Sabatino Tartufi White
13 Truffle Infused Olive Oil All Natural with Natural Extracts and Sabatino Tartufi Black
14 Truffle Infused Olive Oil All Natural with Natural Extracts (the “Products”) are not
15 “infused with actual” white or black truffles.

16 Plaintiffs’ Amended Complaint is completely devoid of sufficient facts to
17 support its allegations that Defendants’ Products do not contain white or black
18 truffles. The sole allegations are that an unidentified “DNA analysis confirmed that
19 [the Products]” do not contain any truffles and that “another truffle oil manufacturer”
20 believes using actual truffles in truffle oil is not economically feasible. These
21 unsubstantiated allegations are insufficient. Nowhere do Plaintiffs allege they tested
22 the Products for the presence of any alleged artificial truffle flavoring, which is
23 essential to their claim that the Products misleads consumers because it contains a
24 chemicals. Instead, Plaintiffs rely on the naked assertion that “some manufacturers”
25 produce truffle oil that does not contain truffle, and that therefore the Defendants are

26 ¹ Although part of the Sabatino family of companies, Sabatino Truffles New York,
27 LLC does not market or sell truffles. Rather, it is a seven-month-old real estate
holding company established many months after Plaintiffs Mirza and Crespo are
28 alleged to have purchased the Products. See Defs.’ Req. for Judicial Notice in Supp.
of Defs.’ Mot. to Dismiss the Am. Compl. (“Defs.’ RJN”) Ex. A.

1 no exception. Plaintiffs provide no other facts to support their allegation that there is
2 no truffle infusion, and no amount of repetition, hyperbole, and legal conclusions will
3 compensate for Plaintiffs' pleading defects.

4 The Amended Complaint is deficient for multiple additional reasons. First, it
5 purports to assert claims for which Plaintiffs have no standing. Each Plaintiff
6 purchased only one of the two Products and lacks standing to assert claims based on a
7 Product they did not purchase.

8 Second, by failing to limit their class definition to a specific time period,
9 Plaintiffs purport to assert claims on behalf of putative class members whose claims
10 are time-barred by the applicable limitations period.

11 Third, Plaintiffs' Amended Complaint is deficient with respect to claims
12 sounding in fraud by failing to allege with particularity that each Defendant engaged
13 in any misconduct, that the alleged misrepresentations were actually false, and that
14 Plaintiffs relied on the alleged misrepresentations in purchasing the Products and did
15 so justifiably.

16 Fourth, Plaintiffs' negligent misrepresentation claims, in particular, must also
17 be dismissed under the economic loss doctrine and for Plaintiffs' failure to plead any
18 special relationship between Defendants and Plaintiffs creating a duty to give correct
19 information.

20 Fifth, no claims for alleged violations of the Magnuson-Moss Warranty Act
21 ("MMWA") can be maintained because the Products' descriptions are not written
22 warranties under the MMWA.

23 Sixth, Plaintiffs fail to state a claim for breach of the implied warranty of
24 merchantability because Plaintiffs lack privity with Defendants and do not allege that
25 the Products are unfit for ordinary use.

26 Seventh, Plaintiffs' unjust enrichment claims under California and New York
27 law must be dismissed as California does not recognize such a cause of action, and
28 any relationship between Plaintiffs and Defendants is too attenuated to allow for an

1 unjust enrichment claim under New York law. Eighth, Plaintiffs fail to allege facts
2 sufficient to demonstrate that they incurred an ascertainable loss.

3 Finally, Plaintiffs cannot assert California, New York, and Pennsylvania state
4 law claims on behalf of a nationwide class based merely on putative class members’
5 purchases of the Products in those states. Plaintiffs have failed to plead facts showing
6 that such states have significant contacts to the nationwide class members’ claims to
7 render the application of their laws constitutional.

8 **BACKGROUND**

9 Plaintiffs allege that in 2016, they each purchased a bottle of Sabatino White
10 Truffle Infused Olive Oil or Sabatino Black Truffle Infused Olive Oil from various
11 retailers in California, Pennsylvania, and New York. Am. Compl. ¶¶ 6-8. Plaintiffs
12 contend that the sale of the Products, and, indeed, all truffle oil products, is inherently
13 fraudulent because truffle oil is little more than a “remarkably successful scam on
14 foodie culture” and because “another truffle oil manufacturer recently acknowledged
15 [that] it is not economically feasible for manufacturers to use actual truffles in truffle
16 oil.” *Id.* ¶¶ 19, 28. Specifically, Plaintiffs assert that Defendants violated the law “by
17 falsely representing . . . that Sabatino Truffle Oil was infused with ‘White Truffle’ and
18 ‘Black Truffle,’ respectively, when, in fact, it is infused with artificial chemicals.” *Id.*
19 ¶ 51; *see also id.* ¶¶ 63, 70, 77, 84, 104, 109, 111, 121.

20 Based on this sweeping indictment of truffle oil as a whole, Plaintiffs leap to the
21 conclusion that *every bottle* of truffle oil sold in the United States does not contain
22 actual truffles, and thus concludes that the Defendants engaged in “false, misleading,
23 and deceptive misbranding of their Sabatino White Truffle Infused Olive Oil and
24 Sabatino Black Truffle Infused Olive Oil” because they are flavored with a “perfume
25 known as ‘2,4-dithiapentane’” and are “not infused with real truffles.” *Id.* ¶ 1.
26 Plaintiffs do not allege that the Products they purchased are identical to those of other
27 manufacturers that supposedly do not contain trace amounts of truffle. *Id.* ¶ 20. Nor
28 do Plaintiffs allege any basis for what these other manufacturers do, or even purport to

tie what “some manufactures” do, to what Sabatino does. *Id.* Plaintiffs do not allege they even tested Sabatino’s Products for the presence of any artificial flavoring, or have any independent basis to establish the veracity of the labeling. Nor do Plaintiffs allege what type of DNA test was performed, what species of truffle they tested for, or what reference they used to determine whether the oil contains white or black truffle. In fact, Plaintiffs do not even allege that the Products they purchased tasted bad. Rather, Plaintiffs digress into a litany of purported bad acts and an alleged profit motive for the ultimate conclusory allegation that finds no factual support in the Amended Complaint. *Id.* ¶¶ 19, 24, 25, 27, 29.

Plaintiffs allege they saw representations that the Products were infused with black or white truffles, relied on them in deciding to purchase the Products, and “would not have purchased [the Products] if he [or she] had known that [the Products were] not, in fact, infused with black [or white] truffles.” *Id.* ¶¶ 6-8. But Plaintiffs allege no other facts regarding the particular circumstances of their purchases, including when or how they came to believe that the Products were misrepresented.

On behalf of themselves and putative class members who purchased the Products at any time in California, New York, or Pennsylvania, Plaintiffs assert seven claims for relief based on various alleged violations of California, New York, and Pennsylvania, and federal consumer protection laws, as well as five state common law claims. *See id.* ¶¶ 45-139.² Moreover, Plaintiffs purport to assert their MMWA claim and common law claims for breach of express warranty, breach of implied warranty of merchantability, unjust enrichment, negligent misrepresentation, and fraud on behalf a

² Am. Compl. ¶¶ 45-54 (California Consumers Legal Remedies Act (“CLRA”), Cal. Civ. Code §§ 1750-1785); *id.* ¶¶ 55-67 (California’s Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code §§ 17200-17210); *id.* ¶¶ 68-71 (California’s False Advertising Law (“FAL”), Cal. Bus. & Prof. Code §§ 17500 *et seq.*); *id.* ¶¶ 72-78 (deceptive acts or practices under New York Gen. Bus. Law § 349); *id.* ¶¶ 79-85 (false advertising under New York Gen. Bus. Law § 350); *id.* ¶¶ 86-97 (Pennsylvania’s Unfair Trade Practices and Consumer Protection Law (“UTPCPL”), 73 Pa. Const. Stat. §§ 201-2 *et seq.*); *id.* ¶¶ 98-106 (Magnuson-Moss Warranty Act (“MMWA”), 15 U.S.C. §§ 2301 *et seq.*); *id.* ¶¶ 107-111 (breach of express warranty); *id.* ¶¶ 112-121 (breach of implied warranty of merchantability); *id.* ¶¶ 122-126 (unjust enrichment); *id.* ¶¶ 127-134 (negligent misrepresentation); *id.* ¶¶ 135-139 (fraud).

1 putative nationwide class defined to capture any and all individuals who purchased
2 one of the Products anywhere in the nation at any time. *See id.* ¶ 36 (“Plaintiffs seek
3 to represent a class defined as all persons in the United States who purchased Sabatino
4 Truffle Oil.”); *id.* ¶¶ 98-139.

5 **ARGUMENT**

6 **I. Claims For Which Plaintiffs Lack Standing Exceed The Court’s Subject
7 Matter Jurisdiction**

8 “Federal courts are courts of limited jurisdiction.” *E.g., Kokkonen v. Guardian*
9 *Life Ins. Co.*, 511 U.S. 375, 377 (1994). The case or controversy requirement under
10 Article III of the U.S. Constitution “limits federal courts’ subject matter jurisdiction
11 by requiring that plaintiffs have standing.” *Mlejneky v. Olympus Imaging Am., Inc.*,
12 No. 2:10-CV-02630JAM-KJN, 2011 WL 1497096, at *1 (E.D. Cal. Apr. 19, 2011)
13 (citing *Allen v. Wright*, 468 U.S. 737, 750 (1984)). “Standing is a jurisdictional
14 element that must be satisfied prior to class certification.” *Nelsen v. King Cnty.*, 895
15 F.2d 1248, 1249-50 (9th Cir. 1990) (internal quotations omitted). “If the litigant fails
16 to establish standing, he may not ‘seek relief on behalf of himself or any other
17 member of the class,’” *id.* at 1250 (quoting *O’Shea v. Littleton*, 414 U.S. 488, 494
18 (1974)), because prudential limitations on federal court jurisdiction require a plaintiff
19 to “assert his own legal rights and interests, not those of others. . .” *Miller v.*
20 *Ghirardelli Chocolate Co.*, 912 F. Supp. 2d 861, 868 (N.D. Cal. 2012).

21 To establish Article III standing, Plaintiffs must demonstrate an “injury in fact”
22 that is concrete and particularized and actual or imminent, not conjectural or
23 hypothetical. *Friends of the Earth, Inc. v. Laidlaw Env'l. Servs. (TOC), Inc.*, 528 U.S.
24 167, 180-81 (2000). The injury must be fairly traceable to Defendants’ alleged
25 misconduct and likely to be redressed by a favorable decision. *Id.* at 181. If the
26 complaint on its face fails to allege facts sufficient to establish subject matter
27 jurisdiction, a motion to dismiss for lack of subject matter jurisdiction will be granted.
28 *Herskowitz v. Apple Inc.*, 940 F. Supp. 2d 1131, 1138 (N.D. Cal. 2013).

1 **A. Plaintiffs Lack Standing To Assert Claims Based On Products They
2 Did Not Purchase**

3 While Plaintiffs allege to have purchased one of the two Products, their claims
4 are not limited to the actual product they purchased. Quiroz and Crespo claim to have
5 only purchased Sabatino White Truffle Infused Olive Oil. Am. Compl. ¶¶ 6, 8.
6 Nonetheless, Quiroz seeks to represent a California subclass of all putative class
7 members, and Crespo seeks represent a New York Subclass of all putative class
8 members, including those who purchased Sabatino Black Truffle Infused Olive Oil.
9 Id. ¶¶ 37, 39. Similarly, Mirza only purchased Sabatino Black Truffle Infused Olive
10 Oil but seeks to represent a Pennswombylvania subclass of all putative class
11 members, including those who purchased Sabatino White Truffle Infused Olive Oil.
12 See id. ¶¶ 7, 38. For a product they never purchased, Plaintiffs have no basis to allege
13 whether it was accurately represented, that Plaintiffs were misled by the product's
14 labeling, or that the product caused them any injury. Thus, Plaintiffs lack both
15 constitutional and statutory standing³ to assert claims based on products they never
16 purchased.

17 The named plaintiff in a putative class action "cannot expand the scope of his
18 claims to include a product he did not purchase or advertisements relating to a product
19 that he did not rely upon." *Johns v. Bayer Corp.*, No. 09CV1935DMS (JMA), 2010
20 WL 476688, at *5 (S.D. Cal. Feb. 9, 2010) (dismissing all claims regarding a product
21 not purchased by named plaintiff); *see also, e.g., Hairston v. S. Beach Beverage Co., Inc.*, No. CV 12-1429-JFW (DTBx), 2012 WL 1893818, at *5 n.5 (C.D. Cal. May 18,
22 2012) ("Plaintiff cannot expand the scope of his claims to include a product he did not
23 purchase." (internal quotations omitted)). This is because a plaintiff may not make
24 use of the class action procedure to assert claims that obviously could not be pursued
25

26 ³ The CLRA, FAL, and UCL require Plaintiffs to allege a legally cognizable injury.
27 *See* Cal. Civ. Code § 1780(a) (CLRA requires "damage as a result of . . . [a] practice
28 declared to be unlawful"); Cal. Bus. & Prof. Code §§ 17204, 17535 (UCL and FAL
 claims require the plaintiff to have suffered an "injury in fact" and have "lost money
 or property" as a result of the defendant's conduct).

1 in a suit asserting only his or her own rights. *See Blum v. Yaretsky*, 457 U.S. 991, 999
2 (1982) (“[A] plaintiff who has been subject to injurious conduct of one kind [does not]
3 possess by virtue of that injury the necessary stake in litigating conduct of another
4 kind, although similar, to which he has not been subject.”). Accordingly, the claims
5 based on alleged misrepresentations for a product Plaintiffs never purchased should be
6 dismissed.

7 **II. Plaintiffs’ Claims Are Time-Barred To The Extent They Are Brought On
8 Behalf Of Putative Class Members Who Purchased The Products Outside
9 Of The Applicable Limitations Period**

10 Plaintiffs assert twelve causes of action on behalf of a putative class defined as
11 “all persons in the United States who purchased Sabatino Truffle Oil” without a
12 defined class period. Am. Compl. ¶ 36. These claims are subject to two- to six-year
13 statutes of limitations.⁴ Therefore, to the extent Plaintiffs assert claims on behalf of

14 ⁴ Negligent misrepresentation claims under California law, as well as fraud and
15 negligent misrepresentation claims under Pennsylvania law, are subject to a two-year
16 statute of limitations. Cal. Civ. Proc. Code § 339 (negligent misrepresentation); 42
Pa. Cons. Stat. § 5524(7) (fraud and negligent misrepresentation). Thus, Plaintiffs
cannot assert these claims on behalf of consumers purchased the Products before May
3, 2015.

17 Claims based on CLRA, FAL, sections 349 and 350 of the New York General
18 Business Law, common law fraud under California law, and unjust enrichment under
19 New York law for monetary relief are subject to a three-year statute of limitations.
Cal. Civ. Proc. Code § 338(d) (fraud and FAL); Cal. Civ. Code § 1783 (CLRA);
20 *Watkins v. Vital Pharm., Inc.*, No. CV 12-09374 SJO (JCx), 2013 WL 5972174, at *5
(C.D. Cal. Nov. 7, 2013) (noting three-year limitations period for CLRA claim); N.Y.
C.P.L.R. §§ 213(1), 214(2). Thus, Plaintiffs cannot assert these claims on behalf of
21 consumers who purchased the Products before May 3, 2014.

22 Plaintiffs’ claims based on the UCL, breaches of an express or implied warranty under
23 California, Pennsylvania, and New York law, and unjust enrichment under
24 Pennsylvania and New York law, and the MMWA are subject to a four-year statute of
25 limitations period. Cal. Bus. & Prof. Code § 17208 (UCL); Cal. Com. Code § 2725
(breach of express and implied warranty); 42 Pa. Cons. Stat. § 5525(a); *Momentive
Performance Materials USA, Inc. v. AstroCosmos Metallurgical, Inc.*, 659 F. Supp. 2d
332, 347-38 (N.D.N.Y. 2009) (applying four-year statute of limitations under section
2-275 of the Uniform Commercial Code to warranty claims); *Cole v. Lawrence*, 701
A.2d 987, 989 (Pa. Super. Ct. 1997) (Pennsylvania claim for unjust enrichment
subject to four-year statute of limitations under 42 Pa. Cons. Stat. § 5525(a)(4)
applicable to actions based on a contract implied at law); *Kirsopp v. Yamaha Motor
Co. Ltd.*, No. CV 14-00496 BRO (VBKx), 2015 WL 11197829, at *4 n.2 (C.D. Cal.
Jan. 7, 2015) (applying the most analogous state statute of limitations for MMWA

1 putative class members who purchased the Products outside of the applicable
2 limitations period, those claims are time-barred and must be dismissed.

3 **III. Plaintiffs Fail To Meet The Basic Pleading Standards**

4 This Court must dismiss Plaintiffs' claims under Rule 12(b)(6) of the Federal
5 Rules of Civil Procedure, if accepting the allegations as true, the Amended Complaint
6 fails to state facts which would support relief. To survive a motion to dismiss, a
7 complaint must allege sufficient facts "to state a claim to relief that is plausible on its
8 face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see also* Fed. R. Civ. P.
9 8(a) (requiring allegations "showing that the pleader is entitled to relief"). Plaintiffs
10 must demonstrate "more than a sheer possibility that a defendant has acted
11 unlawfully," *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), with factual allegations
12 "enough to raise a right to relief above the speculative level," *Twombly*, 550 U.S. at
13 555. A complaint must include more "than labels and conclusions. . . a formulaic
14 recitation of the elements of a cause of action will not do." *Id.* Thus, while well-
15 pleaded allegations of fact are accepted as true, legal conclusions and "[t]hreadbare
16 recitals of the elements of a cause of action, supported by mere conclusory
17 statements" are not. *Iqbal*, 556 U.S. at 678. These pleading rules were designed to
18 protect parties from the situation here, *i.e.*, being exposed to expensive and time
19 consuming litigation and discovery fishing expeditions based only on irrelevant facts
20 and conclusory allegations. *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005).

21 Plaintiffs fail to allege sufficient facts to suggest that the Products at issue in
22 *this* case actually are not infused with actual truffles, or that they contain a synthetic

23 claims). Thus, Plaintiffs cannot assert these claims on behalf of consumers who
24 purchased the Products before May 3, 2013.

25 Plaintiffs' claims based on the UTPCPL, as well as fraud-based negligent
26 misrepresentation and common law fraud under New York law, are subject to a six-
27 year statute of limitations. 42 Pa. Cons. Stat. § 5525(a)(8); *Milin Pharmacy, Inc. v.*
Cash Register Sys., Inc., 570 N.Y.S.2d 341, 341 (N.Y. App. Div. 1991) (negligent
28 misrepresentation and fraud). Thus, Plaintiffs cannot assert these claims on behalf of
consumers who purchased the Products before May 3, 2011.

1 version of 2,4-dithiapentane. While Plaintiffs assert that the Products are
2 misrepresented because they “are flavored with an industrially produced, chemically-
3 derived perfume known as ‘2,4-dithiapentane,’” they allege no facts demonstrating
4 that the mere presence of 2,4-dithiapentane is equivalent to an absence of truffle
5 infusion.⁵ Although Plaintiffs apparently are comfortable pleading only conclusory
6 allegations regarding the ingredients in the Products, despite lacking factual support
7 for these conclusions, this approach fails controlling standards of pleading. *Iqbal*, 556
8 U.S. at 678.

9 Plaintiffs here make equally sweeping and unfounded allegations that the
10 Product labeling is false because it is not infused with actual truffles, but the basis for
11 this unsupported allegation is that it is a “scam on foodie culture” and that “[d]espite
12 the name, *some* manufacturers produce ‘truffle oil’ that does not contain even trace
13 amounts of truffle.” Am. Compl. ¶¶ 19, 20 (emphasis added). Plaintiffs fail to allege
14 *any* facts to support the conclusion that what “some manufactures do” is what
15 Defendants in this case do. To make this logical leap, Plaintiffs rely on the claim that
16 “another truffle oil manufacturer recently acknowledged [that] it is not economically
17 feasible for manufacturers to use actual truffles in truffle oil.” *Id.* ¶¶ 21, 28. The
18 conclusory statement of what Plaintiffs believe “some manufactures” do and “another
19 truffle oil manufacturer[’s]” opinion cannot demonstrate that Plaintiffs purchased
20 truffle oil from Defendants that was not infused with actual truffles.

21 In an half-hearted attempt to fix this obvious shortcoming Plaintiffs’ amended
22 the Complaint to add the conclusory allegation that the Products were submitted for
23 “DNA identification testing to test for the presence of actual truffles,” which
24 “confirmed that [the Products do] not contain any truffle whatsoever,” *id.* ¶¶ 22-23.
25 But, this too fails to establish a plausible claim that the Products were misrepresented.
26

27 ⁵ Notably, in *Brumfield v. Trader Joe’s Co.*, another “truffle oil” lawsuit filed by
28 Plaintiffs’ counsel in the Southern District of New York, Plaintiffs’ counsel
acknowledged that 2,4-dithiapentane would likely be present in any truffle oil,
“whether made from real truffles or not.” See Defs.’ RJN at 2 & Ex. B.

1 As an initial matter, Plaintiffs repeatedly allege that the Products were flavored with
2 artificial chemicals, *id.* ¶¶ 1, 20, 21, 24, 51, 77, 84, 104, 106, 110, 111, 115, 121, 125,
3 129, 137, and that Plaintiffs would not have purchased the Products had they known
4 they contained artificial chemicals, *id.* ¶¶ 77, 84, 106, 111, 121, 133. However,
5 Plaintiffs do not make any allegations that the Products were tested for artificial
6 flavoring, which is the crux of Plaintiffs' claim that the Products' descriptions mislead
7 consumers. Ostensibly Plaintiffs failed to test for the synthetic, or tested and found no
8 indication that there is any synthetics in the Products. With nothing more than the
9 naked assertion about the use of synthetics in the products, the claims fail.

10 Second, while Plaintiffs assert the "DNA identification testing" confirmed the
11 Products do not contain truffle, they provide no information about the testing or any
12 reason to believe it could "confirm" such a thing. Plaintiffs provide no information
13 about the type of DNA test performed, what species of truffle they tested for, or what
14 reference they used to determine whether the oil contains white or black truffle.⁶
15 There are no facts pled to even support that DNA tests can even detect the presence of
16 truffle flavored by black truffles (as opposed to testing the specific piece of truffle to
17 determine its particular species). Plaintiffs simply provide no specific factual
18 allegations that could plausibly support the conclusions giving rise to the claim. *See*
19 *Iqbal*, 556 U.S. at 678-82. As such, Plaintiffs' allegations fail to meet the basic
20 pleading standards and must be dismissed. *See Moorer v. Stemgenex Med. Grp., Inc.*,
21 No. 3:16-cv-02816-AJB-NLS, 2017 U.S. Dist. LEXIS 53294, at *21-24 (S.D. Cal.
22 Apr. 6, 2017) (falsity of advertising claims regarding efficacy of defendants' products

23 ⁶ While DNA evidence may be reliable in identifying a match between a reference and
24 a sample, proving the absence of truffles would, at minimum, require testing for any
variety the Product might contain (and that all such species have had their DNA
sequenced). Plaintiffs have failed to plead any facts demonstrating what they even
25 tested for, and without more information, Plaintiffs' reference to DNA testing
establishes nothing about whether the Products contained artificial ingredients. *See*
26 *Cascade Yarns, Inc. v. Knitting Fever, Inc.*, No. C10-861RSM, 2013 U.S. Dist.
LEXIS 189131, at *17 (W.D. Wash. Sept. 10, 2013) (mere detection of goat fibers
27 labeled as cashmere through DNA testing not sufficient to show the presence of actual
cashmere).

1 not adequately alleged where plaintiffs did not allege that “Defendants’ claims have
2 actually been disproved” and “fail[ed] to mention the existence of any scientific
3 study” showing that the claims were false or misleading); *Eckler v. Wal-Mart Stores,*
4 Inc., No. 12-CV-727-LAB-MDD, 2012 WL 5382218, at *6-7 (S.D. Cal. Nov. 1,
5 2012) (finding no “facial plausibility” to plaintiff’s false and misleading advertising
6 claims where plaintiffs’ studies “simply wouldn’t show what [plaintiff] claims they
7 do,” thereby leaving the court with no facts from which to infer what defendant is
8 liable for false advertising).⁷

9 **IV. Plaintiffs Fail To Meet The Heightened Pleading Requirement For Claims
10 Sounding In Fraud**

11 Plaintiffs’ claims sounding in fraud⁸ should be dismissed because Plaintiffs

12 ⁷ See also *Tomasino v. Estee Lauder Cos. Inc.*, 44 F. Supp. 3d 251, 258 (E.D.N.Y.
13 2014) (plaintiff failed to adequately plead that defendant’s product claims were
14 misleading where “plaintiff point[ed] to nothing, in the form of scientific evidence or
otherwise, that could discredit [defendant’s] statements” about its products); cf.
15 *Wallace v. ConAgra Foods, Inc.*, 747 F.3d 1025, 1030-31 (8th Cir. 2014) (injury from
16 product defect insufficiently alleged because plaintiffs failed to allege that “their
product *actually exhibited* the alleged defect” and relied on general allegation that
they “paid a premium price for the [Products] purchased believing them to be 100%
strictly kosher, when they weren’t”).

17 ⁸ In addition to their common law fraud claims, Plaintiffs’ CLRA, UCL, FAL, and
18 UTPCPL claims, as well as their claims for negligent misrepresentation under
California, New York, and Pennsylvania law and unjust enrichment under New York
and Pennsylvania law, sound in fraud. See, e.g., Am. Compl. ¶ 54 (asserting UCL
19 claim based on allegation that “[b]y committing the acts and practices alleged herein,
Defendants have violated [the UCL]. . . by engaging in unlawful, fraudulent, and
unfair conduct”). Accordingly, they are subject to the Rule 9(b) heightened pleading
standard. See, e.g., *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009)
20 (“Rule 9(b)’s heightened pleading standards apply to claims for violations of the
CLRA and UCL.”); *Cortina v. Wal-Mart, Inc.*, No. 13-cv-02054, 2014 WL 2860285,
21 at *1-3 (S.D. Cal. June 23, 2014) (dismissing UCL, CLRA, and FAL claims because
for failure to satisfy Rule 9(b)); *Weinberg v. Sun Co., Inc.*, 565 Pa. 612, 618 (2001)
22 (“The UTPCPL’s ‘underlying foundation’ is fraud prevention.”); *Smith v. Bristol-*
Myers Squibb Co., No 3:06-cv-6053 (FLW), 2009 WL 5216982, at *6-7 (D.N.J. Dec.
23 30, 2009) (applying Rule 9(b) to UTPCPL claim); *Glen Holly Entm’t, Inc. v.
Tektronix, Inc.*, 100 F. Supp. 2d 1086, 1093 (C.D. Cal. 1999) (negligent
24 misrepresentation claims must satisfy Rule 9(b)); *Marcus v. Frome*, 275 F. Supp. 2d
25 496, 503 (S.D.N.Y. 2003) (same); *Hanover Ins. Co. v. Ryan*, 619 F. Supp. 2d 127, 142
26 (E.D. Pa. 2007) (same); *Hines v. Overstock.com, Inc.*, No. 09 CV 991 (SJ), 2013 WL
27 4495667, at *11 (E.D.N.Y. Aug. 19, 2013) (unjust enrichment claim premised on
fraud must satisfy Rule 9(b)); *State Farm Mut. Auto. Ins. Co. v. Ficchi*, No. 10-555,
2011 U.S. Dist. LEXIS 64027, at *48-51 (E.D. Pa. June 10, 2011) (same).

1 have failed to plead these claims with the heightened particularity required by Rule
2 9(b). Where, as here, Plaintiffs allege fraudulent conduct and rely on this conduct as
3 the basis for their claims, such claims are grounded or sound in fraud and are subject
4 to the heightened pleading standard of Rule 9(b). Rule 9(b) requires Plaintiffs to “set
5 forth *more* than neutral facts necessary to identify the transaction” and specifically
6 allege “the who, what, when, where, and how of the misconduct charged.” *E.g.*,
7 *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124-25 (9th Cir. 2009); *Vess v. Ciba-*
8 *Geigy Corp. USA*, 317 F.3d 1097, 1103-04, 1106 (9th Cir. 2003) (requiring the
9 circumstances constituting the alleged fraud [to] be specific enough to give defendants
10 notice of the particular misconduct. . . so that they can defend against the charge and
11 not just deny that they have done anything wrong”).

12 **A. Plaintiffs Have Not Alleged Each Defendant’s Misconduct With
13 Particularity**

14 The Amended Complaint impermissibly lumps all the “Defendants” together in
15 the allegations, despite the fact that each Defendant is in a very different position.
16 Where multiple defendants are involved, Plaintiffs must state with particularity each
17 Defendant’s alleged role in the fraud and cannot simply “lump multiple defendants
18 together” in their pleading. *Swartz v. KPMG LLP*, 476 F.3d 756, 764-65 (9th Cir.
19 2007); *see also Gonzalez v. Planned Parenthood of L.A.*, No. CV 05-8818 AHM
20 (FMOx), 2011 WL 1481398, at *8 (C.D. Cal. Apr. 19, 2011) (“Rule 9(b) does not
21 allow a complaint to merely lump multiple defendants together but require[s]
22 plaintiffs to differentiate their allegations when suing more than one defendant. . .”
23 (internal quotations omitted)). Plaintiffs “must identify what action each Defendant
24 took that caused Plaintiffs’ harm, without resort to generalized allegations against
25 Defendants as a whole.” *In re iPhone Application Litig.*, No. 11-MD-02250-LHK,
26 2011 WL 4403963, at *8 (N.D. Cal. Sept. 20, 2011).

27 Plaintiffs fail to meet the Rule 9(b) standard in alleging misconduct as to both
28 Defendants. The entirety of the Amended Complaint references Defendants

1 collectively as “Defendants” or “Sabatino” and is silent on each Defendant’s role in
2 the alleged misbranding of the Products or any specific action each Defendant took.
3 As mentioned above, Plaintiffs do not and cannot allege any specific misconduct as to
4 Sabatino Truffles New York, LLC, as it is a seven-month-old real estate holding
5 company established many months after Mirza and Crespo are alleged to have
6 purchased the Products.⁹ Plaintiffs’ sole individualized allegation is that each
7 Defendant “holds itself out as an importer of gourmet truffle oils and other Italian
8 delicacies” and “markets and sells these oils widely throughout the United States.”
9 Am. Compl. ¶¶ 9-10. The heightened pleading standard, however, requires more than
10 alleging that *someone* from one or more corporate entities said *something* misleading
11 or concealed *something*. See *Mathison v. Bumbo*, No. SA CV08-0369 DOC (ANx),
12 2008 WL 8797937, at *7 (C.D. Cal. Aug. 18, 2008) (fraud not plead with sufficient
13 particularity where plaintiff contended all defendants were responsible for alleged
14 misleading statements). By alleging misconduct by “Defendants” collectively,
15 Plaintiffs fall far from providing the required notice to Defendants under Rule 9(b) as
16 to the nature of the claims being asserted against them and the particular conduct
17 challenged for each Defendant. See, e.g., *Vess*, 317 F.3d at 1106.

18 **B. Plaintiffs Have Not Adequately Plead That The Products’
19 Descriptions Were False**

20 Plaintiffs’ fraud-based claims must be dismissed because the Amended
21 Complaint fails to allege specific, non-conclusory facts required by Rule 9(b)
22 supporting the falsity of the representation that the Products are “Black Truffle [or
23 White Truffle] Infused Olive Oil.” See, e.g., *Cortina v. Wal-Mart, Inc.*, No. 13-cv-
24 02054 BAS (DHB), 2014 WL 2860285, at *1-3 (S.D. Cal. June 23, 2014) (dismissing

25

⁹ In ruling on a motion to dismiss, the Court may consider facts that are properly
26 subject to judicial notice. E.g., *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S.
27 308, 322 (2007); see also Fed. R. Evid. 201(b). That Sabatino Truffles New York,
28 LLC was established on November 17, 2016 is a fact that “can be accurately and
readily determined” from Sabatino Truffles New York, LLC’s articles of
incorporation filed with the New York Secretary of State. See Defs.’ RJD at 1-2.

1 UCL, CLRA, FAL, and other claims because plaintiff failed to sufficiently alleged
2 that the challenged representations were misleading). It is not sufficient for the
3 conclusory allegations of falsity to be detailed; allegations of falsity must be supported
4 by specific, “concrete” facts alleged in the complaint. *Id.* at *2, *4. In *Cortina*, like
5 this case, to support her allegations that Wal-Mart’s representations regarding Equate
6 CoQ-10 were false and misleading, the plaintiff compared Equate Co-Q10 to
7 competitor products, and based on that comparison, alleged that Equate Co-Q10’s
8 claims were not true. *Id.* The court dismissed the plaintiff’s fraud-based claims for
9 failure to meet the Rule 9(b) pleading standard; while the plaintiff had identified the
10 purportedly misleading representations, the plaintiff’s product comparisons were not
11 sufficiently “concrete” and the alleged falsity of defendant’s representations were not
12 otherwise supported by specific facts in the complaint. *Id.*

13 Here, Plaintiffs’ fraud-based claims fail because there are no specific facts in
14 the Amended Complaint supporting the alleged falsity of Defendants’ Products.
15 Plaintiffs merely allege that the Products are not accurately represented because they
16 “are flavored with an industrially produced, chemically-derived perfume known as
17 ‘2,4-dithiapentane.’” Am. Compl. ¶ 1. Similar to *Cortina*, the only allegations that
18 the labels are false are based on what Plaintiff thinks competitor companies may do.
19 *Id.* ¶ 20. But, nowhere in the Amended Complaint do Plaintiffs establish the basis for
20 the allegation that Defendants use a chemically derived 2,4-dithiapentane or that what
21 “some manufactures do” is what Defendants in this case do. Plaintiffs allude to some
22 “DNA identification testing” but nowhere to Plaintiffs allege they tested the Product
23 for the presence of 2,4 dithiapentane, or any other alleged synthetic truffle flavoring.
24 *Id.* ¶¶ 22, 23. Such conclusory allegations fail to establish that Products contain
25 artificial flavoring, as Plaintiffs claim, and are not in fact infused with black or white
26 truffles. Plaintiffs provide no other particular allegations demonstrating that
27 Plaintiffs’ alleged claim that the Products are flavored with a chemically derived 2,4-
28 dithiapentane renders the Products’ representations false, and as such, the claims must

1 be dismissed. *See, e.g., Drobnak v. Anderson Corp.*, 561 F.3d 778, 784 (8th Cir.
2 2009) (affirming dismissal of fraud-based claims because plaintiff failed to plead facts
3 connecting an alleged defect to the products plaintiffs purchased).

4 **C. Plaintiffs Fail To Adequately Allege Reliance Or Justifiable Reliance**

5 A necessary element of Plaintiffs' CLRA, FAL, and UCL claims is Plaintiffs'
6 reliance on the allegedly deceptive statements. *Princess Cruise Lines, Ltd. v. Superior*
7 *Court*, 179 Cal. App. 4th 36, 42-43, 46 (2009). To maintain a UTPCPL claim for
8 claims for fraud or negligent misrepresentation under California, New York, or
9 Pennsylvania law, Plaintiffs must also plead that their reliance on the alleged
10 misrepresentations was justified.¹⁰ Because these claims are grounded in fraud, Rule
11 9(b) requires that Plaintiffs pinpoint what representation they relied upon and *why*,
12 *when* they determined the representation to be false, and *on what basis* they reached
13 that conclusion. *See, e.g., Kearns*, 567 F.3d at 1124-25 (requiring plaintiffs to allege
14 "the who, what, when, where, and how of the misconduct charged"); *Vess*, 317 F.3d
15 1097 at 1106 (same). Merely stating that Plaintiffs justifiably relied without more is
16 insufficient, as justifiable reliance is not presumed. *See Twombly*, 550 U.S. at 555
17 ("[A] formulaic recitation of a cause of action's elements will not do."); *Hunt v. U.S.*
18 *Tobacco Co.*, 538 F.3d 217, 227-28 (3d Cir. 2008) (rejecting plaintiff's argument for a
19 presumption of reliance as "inconsistent with Pennsylvania case law").

20 Plaintiffs fail to meet this burden. Plaintiffs' conclusory allegation that they
21 "relied" on representations that the Products were infused with black or white truffle
22

23 ¹⁰ *Hunt v. U.S. Tobacco Co.*, 538 F.3d 217, 221-27 (3d Cir. 2008) (requiring justifiable
24 reliance for UTPCPL claim); *Small v. Fritz Cos., Inc.*, 30 Cal. 4th 167, 174-75 (2003)
25 (justifiable reliance is required for fraud claim); *McWreath v. Range Res.—*
26 *Appalachia, LLC*, 81 F. Supp. 3d 448, 470 (W.D. Pa. 2015) (same); *Crigger v.*
27 *Fahnestock & Co.*, 443 F.3d 230, 234-35 (2d Cir. 2006) (same); *B.L.M. v. Sabo &*
28 *Deitsch*, 55 Cal. App. 4th 823, 834 (1997) (negligent misrepresentation under
California law requires justifiable reliance); *Ingrao v. County of Albany*, No. 1:01-CV-
730, 2006 WL 2827856, at *12 (N.D.N.Y. Oct. 2, 2006) (justifiable reliance is an
element of negligent misrepresentation under New York law); *Erie Ins. Exch. v.*
Maier, 963 A.2d 907, 910 (Pa. Super. Ct. 2008) (Pennsylvania negligent
misrepresentation claim requires justifiable reliance).

1 is not supported by facts sufficient to raise Plaintiffs' right to relief beyond mere
2 speculation. *See Iqbal*, 556 U.S. at 678. Plaintiffs only allege that the Products are
3 flavored with chemically derived 2,4-dithiapentane; that the Products were
4 "mislabeled in that [they were] not infused with actual 'Black Truffle[s]' [or White
5 Truffles]"; that Plaintiffs "relied on these representations and warranties in deciding to
6 purchase Sabatino Truffle Oil"; and that "these representations and warranties were
7 part of the basis of the bargain." Am. Compl. ¶¶ 1, 6-8. Plaintiffs also assert that
8 "[r]easonable consumers attach importance to Defendants' 'White Truffle' and 'Black
9 Truffle' claims when making a purchasing decision" and "must and do rely on food
10 label representations and information in making purchasing decisions," *id.* ¶¶ 31-32,
11 but these assertions have no bearing on whether *Plaintiffs* justifiably relied on
12 Defendants' alleged misrepresentations. The Amended Complaint is silent about how
13 Plaintiffs came to believe that the Products were misrepresented.¹¹ Plaintiffs allege
14 that "many consumers are tricked into purchasing what they believe to be truffle oil
15 because chemically derived 2,4-dithiapentane is often disguised on truffle oil product
16 labels as 'aroma,' 'flavor,' or 'essence'" and that "another truffle oil manufacturer"
17 opined that using actual truffles in truffle oil is not economically feasible. *Id.* ¶¶ 26,
18 28. Plaintiffs' knowledge of such observations, if assumed true, would directly
19 undermine Plaintiffs' alleged reliance on the Product descriptions. But Defendants
20 cannot adequately assess the circumstances of Plaintiffs' purported reliance and
21 whether it was justified without additional allegations describing *when* or *how*
22 Plaintiffs came to believe that the Product descriptions were false. *See Doe v.*
23 *SuccessfulMatch.com*, 70 F. Supp. 3d 1066, 1082 (N.D. Cal. 2014) ("[W]ithout any
24 allegation as to when Plaintiffs saw Defendant's representations, when Plaintiffs
25 purchased Defendant's services, and when Plaintiffs discovered Defendant's allegedly
26

¹¹ Plaintiffs' allegations supporting their UTPCPL claim, for example, are silent on
27 reliance. *See, e.g.*, Am. Compl. ¶ 95 (asserting that "Plaintiff Mirza and members of
28 the Pennsylvania Subclass have suffered economic loss" without noting whether or
how Plaintiffs justifiably relied on the alleged misrepresentations).

1 fraudulent conduct, Defendant is unable to actually ‘defend against the charge and not
2 just deny that [it has] done anything wrong.””).

3 **V. Plaintiffs’ Negligent Misrepresentation Claims Fail For Additional Reasons**

4 **A. The Economic Loss Doctrine Bars Plaintiffs’ Claims**

5 At its core, this case is about the alleged economic losses suffered by Plaintiffs
6 as a result of the alleged misrepresentations in the Products’ descriptions. California,
7 New York, and Pennsylvania law apply the economic loss doctrine to bar negligent
8 misrepresentation claims where the alleged wrong has resulted only in economic loss,
9 rather than damage to person or property. *See, e.g., Tiffin Motorhomes, Inc. v.*
10 *Superior Court*, 202 Cal. App. 4th 24, 31 n.11 (2011) (“[A] claim based on
11 negligence . . . will not lie where the wrong has resulted only in economic loss rather
12 than actual damage to person or property.”); *Elkind v. Revlon Consumer Prods. Corp.*,
13 No. 14-CV-2484 (JS) (AKT), 2015 WL 2344134, at *12 (E.D.N.Y. May 14, 2015)
14 (applying the economic loss doctrine to bar negligent misrepresentation claims where
15 the purchaser did not allege personal injury or damage to property); *Fleet Nat'l Bank*
16 *v. Boyle*, No. Civ.A. 04CV1277LDD, 2005 WL 2455673, at *16-17 (E.D. Pa. Sept.
17 12, 2005) (dismissing negligent misrepresentation claim for purely economic losses
18 where defendant was not “in the business of providing information”).

19 Plaintiffs’ negligent misrepresentation claims allege that Plaintiffs incurred
20 some measure of economic losses. *See* Am. Compl. ¶¶ 132, 134 (alleging that
21 Defendants’ alleged negligent misrepresentations “actually induced” Plaintiffs to
22 purchase the products, thereby “caus[ing] damage” to Plaintiffs); *see also id.* ¶ 4
23 (claiming that Plaintiffs paid “a premium purchase price for a worthless product”).
24 Plaintiffs do not allege that they suffered any personal injury or property damage from
25 their use or purchase of the Products, or that Defendants are in the business of
26 providing information. Plaintiffs’ alleged injury is therefore quintessentially
27 economic and barred by the economic loss doctrine.

1 **B. No Privity Or Other Special Relationship Exists Between Defendants
2 And Plaintiffs**

3 To state a claim for negligent misrepresentation under New York or
4 Pennsylvania law, Plaintiffs must adequately plead that Defendants had a duty to give
5 correct information as a result of some special relationship. *See, e.g., Austin v. Albany*
6 *Law Sch. of Union Univ.*, 957 N.Y.S.2d 833, 844-45 (N.Y. App. Div. 2013) (requiring
7 plaintiff to demonstrate “the existence of a special or privity-like relationship
8 imposing a duty on the defendant to impart correct information to the plaintiff” to
9 support negligent misrepresentation claim); *Burke v. UPS*, No. 01-555, 2002 U.S.
10 Dist. LEXIS 11289, at *11 (E.D. Pa. Jan. 9, 2002) (dismissing negligent
11 misrepresentation claim where plaintiff could not establish “some special relationship,
12 contractual or otherwise,” creating a duty). Plaintiffs’ conclusory allegation that
13 “Defendants had a duty to disclose” that the Products are “adulterated product[s] that
14 [are] flavored by artificial chemicals,” Am. Compl. ¶ 129, does not establish the type
15 of special relationship necessary to sustain a negligent misrepresentation claim. *See,*
16 *e.g., Barron Partners, LP v. LAB123, Inc.*, 593 F. Supp. 2d 667, 674 (S.D.N.Y. 2009)
17 (dismissing negligent misrepresentation counterclaim for lack of a “special
18 relationship” where the parties “were merely a buyer and seller of corporate stock”).
19 *Tuosto v. Philip Morris USA Inc.*, No. 05 Civ. 9384 (PKL), 2007 WL 2398507, at *14
20 (S.D.N.Y. Aug. 21, 2007) (finding “no privity where there is no contact between
21 parties and where defendant had no knowledge of the identity of the specific plaintiff”
22 and noting that “mass communication cannot establish privity with unidentified
23 members of the public” (internal quotations and citations omitted)). Because
24 Plaintiffs do not allege any contact with Defendants beyond their purchases of the
25 Products, no special relationship grounded in privity or otherwise can be shown to
26 support Plaintiffs’ negligent misrepresentation claims under New York or
Pennsylvania law.

27 **VI. Plaintiffs Fail To State Proper MMWA Claims As The Products’
28 Descriptions Are Not Written Warranties**

To meet the statutory definition of a “written warranty,” a label representation must constitute a “written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is *defect free or will meet a specified level of performance over a specified period of time.*” 15 U.S.C. § 2301(6) (emphasis added). Descriptions of products are not written warranties under the MMWA. *Viggiano v. Hansen Nat. Corp.*, 944 F. Supp. 2d 877, 897-98 (C.D. Cal. May 13, 2013) (“premium” and “all natural flavors” were product descriptions, not written warranties under the MMWA); *Hairston*, 2012 WL 1893818, at *6 (“all natural with vitamins” was not a written warranty and thus warranted dismissal of MMWA claim with prejudice). Representations that the Products are “Black Truffle [or White Truffle] Infused” are product descriptions, not promises that a product is “defect free” or “will meet a specified level of performance over a specified period of time.” Accordingly, Plaintiffs cannot state a MMWA claim based on these representations.

VII. Plaintiffs’ Implied Warranty Claims Fail

A. Plaintiffs and Defendants Lack Privity

Plaintiffs cannot state a claim for breach of the implied warranty of merchantability under California or New York law if they do not “stand in vertical contractual privity with the defendant.” *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1023 (9th Cir. 2008).¹² A buyer and seller stand in privity if they are in

¹² See also *Atkinson v. Elk Corp. of Tex.*, 142 Cal. App. 4th 212, 229 (2006) (dismissing claim for breach of implied warranty where plaintiff and defendant were not in privity); *Tait v. BSH Home Appliances Corp.*, No. SACV 10-711 DOC (ANx), 2011 WL 1832941, at *4 (C.D. Cal. May 12, 2011) (dismissing breach of implied warranty claim based on California and New York law for plaintiffs’ failure to allege vertical privity with defendants); *Solomon v. Canon USA, Inc.*, 920 N.Y.S.2d 565, 567 (N.Y. App. Div. 2010) (implied warranty claim dismissed because plaintiff was not in privity with defendant); *Miller v. Gen. Motors Corp.*, 471 N.Y.S.2d 280, 282 (N.Y. App. Div. 1984) (stating that in New York, where the only economic loss is alleged, “a cause of action does not lie against a remote [seller] for the breach of an implied warranty”).

1 “adjoining links of the distribution chain.” *Id.* An end consumer who buys from a
2 retailer is not in privity with a manufacturer. *Id.*

3 In this case, Plaintiffs admit that they purchased the Products directly from
4 *retailers*, not Defendants. Am. Compl. ¶ 6 (stating that Quiroz purchased “from
5 World Market in California”); *id.* ¶ 7 (stating that Mirza purchased “from World
6 Market in Pennsylvania”); *id.* ¶ 8 (stating that Crespo purchased “from Key Food in
7 Brooklyn, New York”). Therefore, Plaintiffs’ breach of the implied warranty of
8 merchantability claim based on California and New York law fails as a matter of law
9 and must be dismissed. *See Hartless v. Clorox Co.*, No. 06CV2705 JAH(CAB), 2007
10 WL 3245260, at *2 (S.D. Cal. Nov. 2, 2007) (dismissing claim for breach of implied
11 warranty of merchantability for failure to allege privity); *cf. Mathison*, 2008 WL
12 8797937, at *8 (privity not adequately alleged where plaintiff did not identify the
13 specific defendants from whom the class members purchased the products).

14 **B. The Products Are Not Unfit For Ordinary Use**

15 To allege a breach of the implied warranty of merchantability under California,
16 New York, or Pennsylvania law, a complaint must allege that a product lacks “even
17 the most basic degree of fitness for ordinary use.” *Jessani v. Monini N. Am., Inc.*, No.
18 17 Civ. 3257 (LLS) (S.D.N.Y. Aug. 3, 2017), ECF No. 18 (internal quotations
19 omitted).¹³ Here, Plaintiffs concede that the Products “imitates the distinct taste and
20 smell of real truffles,” *see, e.g.*, Am. Compl. ¶ 20, 21, 24, and do not allege that the
21 Products are unfit for use as a flavored oil. In *Jessani*, the court granted defendant’s
22 motion to dismiss the implied warranty of merchantability claim regarding truffle
23 flavored olive oil where plaintiffs failed to allege that defendant’s product was unfit
24

25 ¹³ *See also Viggiano v. Hansen Nat. Corp.*, 944 F. Supp. 2d 877, 896-97 (C.D. Cal.
26 2013) (dismissing implied warranty of merchantability claim regarding a diet soda
because plaintiff failed to allege any facts suggesting that the soda is not fit for use as
27 a diet soft drink); *McCracken v. Exxon/Mobil Co.*, No. 08-2932, 2009 WL 3822041, at
*5 (E.D. Pa. Nov. 12, 2009) (finding implied warranty of merchantability claim
inadequately plead where plaintiff never asserted that the product malfunctioned or
28 was defective).

1 for use as a flavored olive oil. *Jessani*, No. 17 Civ. 3257, ECF No. 18, at 2.
2 Likewise, it is axiomatic that Plaintiffs' same claim here must be dismissed.

3 **VIII. Plaintiffs' Unjust Enrichment Claims Fail**

4 **A. Unjust Enrichment Is Not A Cause Of Action In California**

5 It is well-established that "there is no cause of action in California for unjust
6 enrichment." *Melchior v. New Line Prods., Inc.*, 106 Cal. App. 4th 779, 793 (2003);
7 *see also Razuki v. Equity Residential Mgmt. LLC*, No. 15-cv-1057 BEN (JLB), 2016
8 WL 337758, at *3 (S.D. Cal. Jan. 26, 2016) (finding no cause of action for unjust
9 enrichment under California law); *Haddock v. Countrywide Bank, NA*, No. 14-cv-
10 6452 PSG (FFMx), 2015 WL 9257316, at *17 (C.D. Cal. Oct. 27, 2015) (same); *Tait*,
11 2011 WL 1832941, at *5 (same). Therefore, Plaintiffs' unjust enrichment claim based
12 on California law should be dismissed.

13 **B. No Relationship Exists Between New York Plaintiffs And Defendants**

14 While privity between Plaintiffs and Defendants is not required for unjust
15 enrichment claims under New York law, some non-attenuated relationship between
16 the parties must be alleged because an unjust enrichment claim is quasi-contractual in
17 nature. *See, e.g., Sperry v. Crompton Corp.*, 863 N.E.2d 1012, 1018 (N.Y. 2007)
18 (finding that the purchaser of tires and the producers of chemicals used in the tires'
19 rubber was too attenuated to support unjust enrichment claim); *see also Reading Int'l*
20 *v. Oaktree Capital Mgmt. LLC*, 317 F. Supp. 2d 301, 333-34 (S.D.N.Y. 2003)
21 (dismissing unjust enrichment claim for failure to allege "a contractual or quasi-
22 contractual relationship with defendants" or a "prior course of dealings with
23 defendants"). Here, Crespo alleges that she purchased Defendants' Product from a
24 third-party retailer in New York. Am. Compl. ¶ 8. Because Plaintiffs fail to allege
25 any non-attenuated connection to Defendants, the unjust enrichment claim under New
26 York law must be dismissed.

27 **1. If New York Plaintiffs' Consumer Protection Law Claims
28 Survive, Their Unjust Enrichment Claims Are Duplicative**

1 In the event that Plaintiffs' claims under sections 349 and 350 of the New York
2 General Business Law survive dismissal (which they should not as discussed above),
3 the New York unjust enrichment claims should be dismissed as duplicative. An
4 unjust enrichment claim "is not available where it simply duplicates, or replaces, a
5 conventional contract or tort claim." *Corsello v. Verizon N.Y., Inc.*, 967 N.E.2d 1177,
6 1185 (N.Y. 2012). New York courts have routinely dismissed as duplicative unjust
7 enrichment claims that are based on the same allegations underlying New York
8 consumer protection law claims.¹⁴

9 Plaintiffs' unjust enrichment claim is grounded in the same allegations
10 underlying their New York statutory claims—i.e., that they suffered pecuniary loss
11 when they purchased the Products in reliance on the Products' allegedly misleading
12 descriptions.¹⁵ Therefore, Plaintiffs' unjust enrichment claim under New York law
13 should be dismissed if their New York consumer protection law claims withstand
14 dismissal.¹⁶

15 **IX. Plaintiffs' Ascertainable Loss Is Not Adequately Alleged**

16 Plaintiffs have not pleaded sufficient facts to put Defendants on notice of their
17 basis for monetary relief. Plaintiffs must plead sufficient facts showing that they are

18 ¹⁴ *Koenig v. Boulder Brands, Inc.*, 995 F. Supp. 2d 274, 290-91 (S.D.N.Y. 2014)
19 (unjust enrichment claim held duplicative where claim based on N.Y. Gen. Bus. Law
20 section 349 survived dismissal); *Goldemberg v. Johnson & Johnson Consumer Cos.*, 8
F. Supp. 3d 467, 483-84 (S.D.N.Y. 2014) (dismissing unjust enrichment claim where
Gen. Bus. Law section 349 and express warranty claims survived and concluding that
unjust enrichment could not be plead in the alternative).

22 ¹⁵ Compare Am. Compl. ¶¶ 77-78, 84-85 (seeking monetary relief under N.Y. Gen.
23 Bus. Law section 350 because the New York Plaintiffs would allegedly "not have
24 purchased [the Products] had they known that [they] were infused with artificial
chemicals, and not infused with 'White Truffle' and 'Black Truffle'"), with *id.* ¶¶ 124-
25 126 (alleging that Plaintiffs "conferred benefits on Defendants by purchasing" the
Products and were "denied the full benefit of their purchase because they did not
purchase a product that was actually infused with 'White Truffle' and 'Black
Truffle'").

26 ¹⁶ Plaintiffs' additional allegation in their Amended Complaint regarding how
27 Defendants were purportedly unjustly enriched by Plaintiffs' purchases of the
28 Products, *see* Am. Compl. ¶ 125, fails to remedy any of the foregoing bases for
dismissal of Plaintiffs' unjust enrichment claims.

1 entitled to damages and the basis for those damages. *See Leyva v. Medline Indus.,*
2 *Inc.*, 716 F.3d 510, 514 (9th Cir. 2013) (“[P]laintiffs must be able to show that their
3 damages stemmed from the defendant’s actions that created the legal liability.”); *In re*
4 *Toyota Motor Corp. Hybrid Brake Mktg., Sales Practices & Prods. Liab. Litig.*, 288
5 F.R.D. 445, 449 n.5 (C.D. Cal. 2013) (holding that, to plead a claim under the CLRA,
6 UCL, or FAL, plaintiffs must show that they suffered damage or injury). Plaintiffs
7 must be able to quantify not only the amount that they paid, but also the value of what
8 they received. “The difference between what the plaintiff paid and the value of what
9 the plaintiff received is a proper measure of restitution.” *In re Vioxx Class Cases*, 180
10 Cal. App. 4th 116, 131 (2009). This is because “a party seeking restitution must
11 generally return any benefit that it has received.” *Dunkin v. Boskey*, 82 Cal. App. 4th
12 171, 198 (2000) (internal quotations and citation omitted). Accordingly, restitutive
13 recovery requires evidence of the actual value of what the plaintiff received. *In re*
14 *Vioxx*, 180 Cal. App. 4th at 131.

15 Here, while Plaintiffs allege that they “would not have purchased [the Products]
16 absent Defendants’ unlawful, fraudulent, and unfair marketing, advertising,
17 packaging, and labeling” or “had they known that [the Products were] infused with
18 artificial chemicals,” e.g., Am. Compl. ¶¶ 62, 77, 84, 106, they do not allege that they
19 paid more for the Products than they are valued. Instead, Plaintiffs merely state that
20 the Products are “worthless” and were sold at a price higher than they should have
21 been. *See id.* ¶¶ 1, 4. These conclusory allegations fails to provide the facts necessary
22 to establish an ascertainable loss arising from their purchase: i.e. what alternative
23 product they might have purchased, and the cost of any alternative product available
24 to them. Instead, Plaintiffs make an assertion based on a price to fluid ounce
25 comparison with another random plain olive oil product in the market. *Id.* ¶ 4. But a
26 comparison with another plain olive oil product has no bearing on whether the
27 Products’ purchase price reflected the Products’ value or whether Plaintiffs suffered
28 any monetary loss by purchasing the Products at that price. In fact, Plaintiffs do not

1 allege they compared the Products to any other truffle infused olive oil that would
2 have provided them the truffle flavor they were seeking. Because Plaintiffs have
3 failed to plead an actual financial loss, the Amended Complaint should be dismissed.

4 **X. Plaintiffs Cannot Assert California, New York, And Pennsylvania State
5 Law Claims On Behalf Of A Nationwide Class**

6 To assert California, New York, or Pennsylvania claims on behalf of putative
7 class members who are not residents of those states, the class action proponent must
8 show that each state has “significant contact or significant aggregation of contacts” to
9 the claims of each class member. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821
10 (1985); *see also Wash. Mut. Bank, FA v. Superior Court*, 24 Cal. 4th 906, 921 (2001).
11 To show minimum contacts, courts look to defendants’ principal place of business,
12 headquarters, state of incorporation, residences of proposed class members, locations
13 of defendants’ departments or agents involved in preparing the advertising and other
14 misrepresentations at issue in the litigation, and the volume of defendants’ business in
15 the state. *See Parkinson v. Hyundai Motor Am.*, 258 F.R.D. 580, 598 (C.D. Cal.
16 2008); *cf. id.* (holding that application of California law comported with due process
17 because plaintiffs alleged that defendant’s relevant operations and substantial business
18 were located in California, many of the alleged wrongful acts emanated from
19 California, and a large volume of defendant’s sales occurred in California). Such a
20 showing is necessary to ensure that application of California, New York, or
21 Pennsylvania law is constitutional. *See Phillips Petroleum Co.*, 472 U.S. at 821.

22 Here, Plaintiffs have failed to allege facts that would enable a nationwide class
23 to assert claims under California, New York, or Pennsylvania law. Plaintiffs purport
24 to bring this action on behalf of “a class defined as all persons in the United States
25 who purchased Sabatino Truffle Oil,” encompassing any and all purchasers of the
26 Products at any time, whether or not they reside in California, New York, or
27 Pennsylvania. Am. Compl. ¶ 36. Plaintiffs have not alleged that the claims by
28 putative class members who are not residents of California, New York, or

Pennsylvania arise from those states' significant contacts to Plaintiffs' claims. Plaintiffs merely allege that Defendants are New York corporations, that Sabatino Truffles New York, LLC maintains its principal place of business in New York, and that Defendants are "importer[s] of gourmet truffle oils and other Italian delicacies" and "market[] and sell[] these oils widely throughout the United States." *Id.* ¶¶ 9-10. No other facts, such as the volume of Defendants' businesses in California, New York, or Pennsylvania or the location from which Defendants' alleged misrepresentations emanated, are alleged to suggest that these states have sufficient contacts to ensure that application of these states' laws to non-resident putative class members' claims is proper. Because Plaintiffs have failed to meet their burden to show that they can plausibly pursue claims under these states' laws on behalf of non-resident putative class members, Plaintiffs' nationwide claims for harms suffered by consumers residing in other states should be dismissed.¹⁷

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court dismiss the Amended Complaint with prejudice.

Respectfully submitted,

Dated: August 4, 2017

SIDLEY AUSTIN LLP

By: /s/ *Alexis Miller Buese*

Alexis Miller Buese

Attorneys for Defendants

Sabatino Truffles New York, LLC and Sabatino North America, LLC

¹⁷ See *McGhee v. Arabian Am. Oil Co.*, 871 F.2d 1412, 1425-26 (9th Cir. 1989) (affirming that different jurisdictions have a “significant interest” in regulating alleged fraud perpetrated against persons within their borders); *Frezza v. Google, Inc.*, No. 5:12-cv-00237-RMW, 2013 WL 1736788, at *6 (N.D. Cal. Apr. 22, 2013) (granting motion to dismiss, citing differences in scienter as “not trivial or wholly immaterial”); *Williams v. Oberon Media, Inc.*, No. cv-09-8764-JFW (AGRx), 2010 WL 8453723, at *8 (C.D. Cal. Apr. 19, 2010) (“Each of the fifty states has an interest in the application of its law to its residents.”).

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on August 4, 2017, I electronically filed the foregoing
3 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF**
4 **DEFENDANTS SABATINO TRUFFLES NEW YORK, LLC AND SABATINO**
5 **NORTH AMERICA, LLC'S MOTION TO DISMISS THE AMENDED**
6 **COMPLAINT** with the Clerk of the Court by using the CM/ECF system. I certify
7 that all participants in this case are registered CM/ECF users and that service will be
8 accomplished by the CM/ECF system.

9 _____
10 */s/ Alexis Miller Buese*
11 Alexis Miller Buese

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